**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

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| JOSEPH MICHAEL ARPAIO,<br><br>Plaintiff,<br><br>v.<br><br>JEFF ZUCKER, CHRIS CUOMO, CABLE NEWS NETWORK, INC., KEVIN ROBILLARD, HUFFINGTON POST, TESSA STUART and ROLLING STONE,<br><br>Defendants. | * | Civil Action No. 1:18-cv-002894-RCL |

* * * * * * * * * * * * * *

**MOTION TO DISMISS**

Defendants TheHuffingtonPost.com, Inc. ("HuffPost" erroneously sued as "Huffington Post") and Kevin Robillard (collectively, the "HuffPost Defendants") respectfully move this Court pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss with prejudice the Complaint of Joseph Michael Arpaio ("Arpaio" or "Plaintiff") for failure to state a claim. Arpaio's defamation claim is barred by the substantial truth doctrine and the libel-proof plaintiff doctrine, and the defamation claim also fails for the independent reason that Arpaio did not – and cannot – adequately allege that the HuffPost Defendants published with the requisite degree of fault – *i.e.*, actual malice. The tortious interference and false light claims should be dismissed as duplicative of the defamation claim, and for other independent reasons.

This Motion is supported by the attached Memorandum of Law and concurrently-filed Request for Judicial Notice. The HuffPost Defendants concurrently file a special motion to dismiss pursuant to the D.C. Anti-SLAPP Act.

**REQUEST FOR HEARING**

The HuffPost Defendants respectfully request a hearing on their Motion to Dismiss.

DATED: March 15, 2019

Respectfully submitted,

/s/ Jean-Paul Jassy
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**MEMORANDUM OF LAW IN SUPPORT OF**
**HUFFPOST DEFENDANTS' MOTION TO DISMISS**
**PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6)**

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## INTRODUCTION

Arpaio – the elected Sheriff of Arizona's Maricopa County for nearly 25 years who revels in controversy, shuns law enforcement norms and flagrantly, knowingly and willfully violated a court order – brings the instant lawsuit against three media companies alleging that a few words have harmed his reputation to the tune of an oddly specific, but astronomical, $300,500,000. His case against HuffPost and one of its reporters, Kevin Robillard, stems from an article, not about Arpaio, but about Kyrsten Sinema, the then-Democratic senatorial nominee (and later elected Senator) from Arizona. In the context of discussing Sinema and her relatively moderate to conservative positions on various issues, the article briefly mentions Arpaio, accurately reporting that he had been convicted of criminal contempt and discusses Sinema's response to the possibility that Arpaio could get a presidential pardon. Arpaio's entire complaint against the HuffPost Defendants centers on just six words in the article that were promptly corrected: "… who had been sent to prison … ." Unashamed by his reputation as a lawless law enforcement officer, Arpaio, who pridefully boasted that "he was going to do business as usual no matter who said otherwise," complains that those words defamed him, tortiously interfered with his ability to raise money for future political campaigns, and put him in a false light because he was pardoned before he ever went to prison. His Complaint should be dismissed with prejudice.

Arpaio's defamation claim fails because case law nationwide spanning over a century makes clear that the gist and sting of the portion of the report at issue is that Arpaio was convicted of criminal conduct; whether he served time in prison is ancillary. The HuffPost piece is therefore protected under the constitutionally-based doctrine of substantial truth. Moreover, the HuffPost article is protected by the libel-proof plaintiff doctrine because any purported damage to Arpaio would be non-existent or nominal at most when coupled with the accurate, but damning, reference

to his criminal conviction. The defamation claim also fails because Arpaio, a household name who is without a doubt a public figure, did not – and cannot – adequately allege that the HuffPost Defendants published with the requisite degree of fault, actual malice – *i.e.*, with knowledge of falsity or reckless disregard for the truth.

Arpaio's tag-along claims for tortious interference and false light fail because they are not based on the HuffPost's publication. Even if they were, they are subject to the same constitutional limitations as the doomed defamation claim. The tortious interference and false light claims should also be dismissed with prejudice because Arpaio does not – and cannot – plausibly allege necessary elements to each of those claims.

The HuffPost Defendants' Motion to Dismiss should be granted with prejudice.

## RELEVANT BACKGROUND

### I. THE PARTIES

#### A. Plaintiff Joe Arpaio

Plaintiff Joseph M. Arpaio, the elected Sheriff of Arizona's Maricopa County for nearly 25 years, is a public figure. *See* Complaint ("Compl."), ¶ 14. In this role, he prided himself on his self-proclaimed moniker of "America's Toughest Sheriff". Compl., ¶ 49. In 2016, the voters of Maricopa County denied Arpaio another term as their Sheriff. [1]

During his tenure as Sheriff, Arpaio became a nationally known figure with particularly outspoken and controversial views on law enforcement, immigration policy and racial profiling. He co-authored two books: *America's Toughest Sheriff: How to Win the War Against Crime* and *Joe's Law: America's Toughest Sheriff Takes on Illegal Immigration, Drugs and Everything Else That*

[1] Maricopa County, Arizona, Recorder's Final Summary Report, November 8, 2016 election, available at https://recorder.maricopa.gov/electionarchives/2016/11-08-2016%20Final%20Summary%20Report.pdf at 6.

*Threatens America*. He has appeared extensively in media interviews and profiles, and has regularly convened press conferences.[2] He spoke at the 2016 Republican National Convention.[3] His aggressive policing style led to dozens, if not hundreds, of civil rights lawsuits against Arpaio and Maricopa County, brought by inmates, politicians, journalists and others.[4] Arpaio even took it upon himself to sue President Obama over executive orders concerning immigration policies.[5] Even after leaving office, Arpaio stayed in the spotlight with a 2018 run for the United States Senate and appearances on the speaking circuit.[6] Arpaio asserts that he intends to run for the Senate again in 2020. Compl., ¶ 16.

[2] *See, e.g., United States v. Arpaio*, 2017 WL 3268180 (D. Ariz. July 31, 2017), at *2-*3 (listing interviews with Fox News, Univision and PBS); *Flake v. Arpaio*, No. CV-15-01132-PHX-NVW, 2016 WL 4095831 (D. Ariz. 2016), at *1-*2 (issuing press releases and holding press conference). A more extensive discussion of Arpaio's background, activities as Sheriff and relationship with the media can be found in the Motion to Dismiss filed in this case by defendants Jeff Zucker, Chris Cuomo and Cable News Network, Inc, as well as the Motion to Dismiss filed earlier this year by Michelle Cottle and The New York Times Company in *Arpaio v. Cottle*, Case No. 1:18-cv-02387-APM (D.D.C.) (Dkt No. 8), at 6-26.

[3] Michael E. Hayden, *Sheriff Joe Arpaio Stumps for Trump at the Republican National Convention*, ABC News (July 21, 2016).

[4] *See, e.g., Lacey v. Maricopa Cnty.*, 693 F.3d 896, 922-923 (9th Cir. 2012) (holding newspaper co-owner adequately stated First Amendment retaliation claim against Arpaio for arrest following publication of articles critical of Arpaio); *Donahoe v. Arpaio*, 869 F.Supp.2d 1020, 1071-72 (D. Ariz. 2012) (member of county board of supervisors sufficiently alleged that facts in search warrant affidavit were false, and Arpaio knew of, directed, or presented such false or misleading information to judge who issued warrant); *Wilson v. Maricopa Cnty.*, 463 F.Supp.2d 987, 996 (D. Ariz. 2006) (claim against Arpaio arising out of fatal assault on county jail inmate by other inmates could proceed past summary judgment). Additional, similar cases are too legion to list here.

[5] *Arpaio v. Obama*, 27 F.Supp.3d 185 (D.D.C. 2014) (dismissing case for lack of standing and subject matter jurisdiction).

[6] Compl., ¶ 15; Bud Kennedy, *Sheriff Joe Arpaio is Coming to Arlington: 'The More Demonstrators the Better,'* Fort Worth Star-Telegram (Feb. 19, 2019); Tom Wright, *Protestors Gather for Joe Arpaio Speech in Carmel*, Monterey Herald (Sep. 13, 2018).

### B. Defendants HuffPost And Kevin Robillard

Defendant TheHuffingtonPost.com, Inc. is an online newspaper, founded in 2005, with newsrooms and editions in 16 countries, and a robust commitment to breaking and featuring stories on politics. Defendant Kevin Robillard is a senior politics reporter with HuffPost, and before that was a politics reporter with Politico.

## II. ARPAIO KNOWINGLY, FLAGRANTLY AND WILLFULLY VIOLATED A COURT ORDER, AND WAS CONVICTED OF CRIMINAL CONTEMPT.

On December 23, 2011, United States District Court Judge G. Murray Snow issued an order enjoining Arpaio and his subordinates "from detaining any person based only on knowledge or reasonable belief, without more, that the person is unlawfully present in the United States …" (the "Injunction"). *United States v. Arpaio*, Case No. CR-16-01012-001-PHX-SRB, 2017 WL 3268180 (D. Ariz. July 31, 2017), at *1. Because Arpaio refused to obey the Injunction, Judge Snow found Arpaio in civil contempt of the Injunction and referred Arpaio for an investigation of criminal contempt. *Id.*; *see also Melendres v. Arpaio*, Case No. CV-07-2513-PHX-GMS, 2016 WL 4414755 (D. Ariz. Aug. 19, 2016), *1-*2 (referring Arpaio for criminal contempt investigation, holding that Arpaio violated the Injunction and that he "did so based on the notoriety he received for, and the campaign donations he received because of, his immigration enforcement activity"). Arpaio was prosecuted by the U.S. Department of Justice, which agreed to limit the prison sentence it would seek to six months. *United States v. Arpaio*, Case No. CR-16-01012-001-PHX-SRB, Dkt. No. 83 (D. Ariz. Mar. 1, 2017) at 2-3.

On July 31, 2017, following a five-day bench trial, United States District Judge Susan R. Bolton found Arpaio guilty of criminal contempt of court. *Arpaio*, 2017 WL 3268180, at *7. Judge Bolton made extensive findings of fact and conclusions of law, including that Judge Snow's

Injunction was "clear and definite," that Arpaio "had knowledge of" the Injunction, and that the "evidence shows a flagrant disregard for Judge Snow's order." *Id.* at *5, *7. Judge Bolton found that Arpaio "announced to the world and to his subordinates that he was going to continue business as usual no matter who said otherwise." *Id.* at *7. The order concluded that Arpaio was "guilty of criminal contempt" because he "willfully violated an order of the court." *Id.* Sentencing was set for October 5, 2017. *Id.*[7] However, before he could be sentenced, President Trump pardoned Arpaio, and Arpaio accepted the pardon. *United States v. Arpaio*, Case No. CR-16-01012-001-PHX-SRB, 2017 WL 4839072 (D. Ariz. Oct. 19, 2017), at *1.[8] Thereafter, Judge Bolton dismissed Arpaio's criminal contempt case with prejudice, but refused Arpaio's subsequent request to vacate all prior rulings in the case, holding that the pardon did not "revise the historical facts." *Id.* at *2 (internal quotation marks omitted).

## III. THE HUFFPOST ARTICLE AND ARPAIO'S COMPLAINT

In 2018, Arpaio unsuccessfully ran for a seat representing Arizona in the United States Senate. Compl., ¶ 15. He came in third place with just 19% of the vote in the Republican primary.[9] The Democratic primary winner was Kyrsten Sinema who eventually won the Senate seat. *Id.*

[7] It is not unusual for criminal contempt to be punished with a prison sentence. *See, e.g., Yates v. U.S.*, 355 U.S. 66, 72 (1957) ("it is unquestioned that imprisonment for a definite term may be imposed to punish the contemnor in vindication of the authority of the court"); *U.S. v. Baxley*, 228 Fed. Appx. 901, 905 (11th Cir. 2007) (finding an 18-month prison sentence for criminal contempt reasonable); *U.S. v. Trudeau*, 812 F.3d 578, 594 (7th Cir. 2016) (upholding prison sentence for criminal contempt); *U.S. v. Prince*, 526 Fed. Appx. 447, 450 (6th Cir. 2013) (affirming imposition of prison sentence for criminal contempt); *U.S. v. Marx*, 553 F.2d 874, 876-877 (4th Cir. 1977) (same); *U.S. v. Hendrickson*, 822 F.3d 812 (6th Cir. 2016) (same).

[8] "A presidential pardon must be accepted to be effective," and "a pardon 'carries an imputation of guilt; acceptance a confession of it.'" *Id.* (citing and quoting *Burdick v. United States*, 236 U.S. 79, 94 (1915)).

[9] *Id.*; Official Canvass of Results from Arizona Secretary of State: https://azsos.gov/sites/default/files/2018%200910%20Signed%20Statewide%20Canvass.pdf.

On November 5, 2018 – *i.e.*, the eve of the 2018 general election – HuffPost published an article written by Kevin Robillard entitled "Kyrsten Sinema Wants You To Know She's Not A Progressive" (the "HuffPost Article"). Compl., Dkt. 1-1; Ex. A to the HuffPost Defendants' concurrently-filed Request for Judicial Notice ("RJN"). As the title suggests, the HuffPost Article focused on Sinema, discussing her policy positions (*e.g.*, on "Medicare for all," taxes and the Affordable Care Act), her moderate voting record in the U.S. House of Representatives, her membership in the Blue Dog Caucus (composed of conservative Democrats) and the pro-business New Democrats, and her endorsement by the U.S. Chamber of Commerce. *Id.* The article also noted that, as a Congresswoman, Sinema voted with the Trump Administration nearly two-thirds of the time. *Id.*

In the course of discussing Sinema's record, the HuffPost Article briefly mentioned Arpaio. *Id.* The Article noted that "every Democratic member of the Arizona congressional delegation – except Sinema –" signed "a letter asking the president not to pardon Arpaio." *Id.* Nevertheless, the article continued, Sinema's campaign sent out "dozens of online fundraising missives invoking Arpaio" in a negative way, including one that read: "'The last time [Vice President Pence] was [in Arizona], he attacked Kyrsten and praised convicted criminal Joe Arpaio!'" *Id.*

Buried in the midst of the discussion of Sinema on the eve of the general election was a brief contextual reference to Arpaio that read: "A few weeks before launching her [Sinema's] Senate bid, rumors began to swirl that Trump was going to pardon the state's notorious former Maricopa County sheriff, Joe Arpaio, who had been sent to prison for contempt of court." *Id.* Arpaio's case against the HuffPost Defendants is all about the words "… ***who had been sent to prison*** …," which language was removed from the article within two days and replaced with "… ***who was convicted of criminal contempt of court***." Compl., Dkt. 1-1 at 2, 3 (emphasis added);

RJN, Exs. A, B (same). A prominently placed correction was contemporaneously added to the article reading: "***CORRECTION:*** *A previous version of this story mistakenly indicated Joe Arpaio went to prison for his conviction."* Compl., Dkt. 1-1 at 3 (emphasis in original); RJN, Ex. B at p. 4 (same).

Arpaio sued the HuffPost Defendants and other media entities and reporters for defamation, tortious interference with prospective business relations and false light. Compl., ¶¶ 35-56. Arpaio's case against the other defendants revolves around allegedly being called a "felon," *id.*, ¶¶ 20-21, 28, 30-31, 36, 41, 53; whereas the case against the HuffPost Defendants centers exclusively on the words: "… who had been sent to prison … ." *Id.*, ¶¶ 24-26.

## LEGAL STANDARD

"[T]he Supreme Court has directed courts to expeditiously weed out unmeritorious defamation suits" in order "[t]o preserve First Amendment freedoms and give reporters … the breathing room they need to pursue the truth[.]" *Kahl v. Bureau of Nat'l Affairs, Inc.*, 856 F.3d 106, 109 (D.C. Cir. 2017). Early resolution of defamation cases on a motion to dismiss "not only protects against the costs of meritless litigation, but provides assurance to those exercising their First Amendment rights that doing so will not needlessly become prohibitively expensive." *Fairbanks v. Roller*, 314 F. Supp. 3d 85, 89 (D.D.C. 2018) (internal quotation marks omitted); *see also Kahl*, 856 F.3d at 109 ("[c]ostly and time-consuming defamation litigation can threaten those essential freedoms [of speech and of the press]").

To survive a motion to dismiss for failure to state a claim under Rule 12(b)(6), a complaint must contain sufficient factual allegations that, if true, "state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Plausibility requires that a complaint raise "more than a sheer possibility that a defendant has acted unlawfully," and requires "the

reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). Pleading facts that are "merely consistent with" a defendant's liability "stops short of the line between possibility and plausibility." *Twombly*, 550 U.S. at 545–46. Thus, a court evaluating a motion to dismiss for failure to state a claim does not accept the truth of legal conclusions, "naked assertion[s] devoid of further factual enhancement," or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements." *Iqbal*, 556 U.S. at 678. Consideration is limited to "well-pleaded factual allegations," *id.* at 679, and "the facts alleged in the complaint, any documents either attached to or incorporated in the complaint and matters of which [the court] may take judicial notice." *Hurd v. D.C. Gov't*, 864 F.3d 671, 678 (D.C. Cir. 2017).

## ARGUMENT

## I. ARPAIO FAILS TO STATE A CLAIM FOR DEFAMATION.

### A. The HuffPost Article Was Substantially True.

#### 1. Arpaio Has The Burden To Demonstrate Falsity.

Falsity is an element of a defamation claim. *Lohrenz v. Donnelly*, 223 F.Supp.2d 25, 39 (D.D.C. 2002).[10] "The burden of proving falsity rests ***squarely on the plaintiff***, [who] must demonstrate either that the statement is factual and untrue, or an opinion based implicitly on facts that are untrue." *Lane v. Random House*, 985 F.Supp. 141, 150 (D.D.C. 1995) (emphasis added); *see also Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-777 (1986) (burden of proving

[10] The elements of defamation are: "(1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm." *Id.* at 39. Furthermore, if a court finds that the plaintiff is a public figure, that "requires plaintiff to show that defendants acted with 'actual malice' in publishing the allegedly defamatory statements." *Id.* at 40.

falsity is on plaintiff in a defamation case against a media defendant where the underlying issue is of public concern). If the plaintiff is a public figure then he or she must prove falsity with clear and convincing evidence. *Pearce v. E.F. Hutton Grp., Inc.*, 664 F.Supp. 1490, 1512 (D.D.C. 1987); *Sharon v. Time, Inc.*, 599 F.Supp. 538, 558 (S.D.N.Y. 1984); *cf. Fairbanks*, 314 F.Supp.3d at 90 ("[t]he First Amendment requires public figures suing in defamation to 'demonstrate by at least a fair preponderance of the evidence that the [allegedly] defamatory statement is false,' with close cases decided against them") (citation omitted).

A statement is nonactionable if "[t]he sting of the charge ... is substantially true," *Liberty Lobby, Inc. v. Dow Jones & Co.*, 838 F.2d 1287, 1296 (D.C. Cir. 1988) – *i.e.*, "[m]inor inaccuracies do not amount to falsity so long as the substance, the gist, the sting of the libelous charge be justified," *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 517 (1991) (internal quotation marks omitted). *See also Ning Ye v. Holder*, 644 F.Supp.2d 112, 116 (D.D.C. 2009) (it is an "absolute defense" to a defamation claim if the statements are "substantially true"). The "court must … determine the threshold question of law of whether the statement is false." *Smith v. Clinton*, 253 F.Supp.3d 222, 239 (D.D.C. 2017). In the context of granting a motion to dismiss, and "[w]here the question of truth or falsity is a close one, a court should err on the side of nonactionability." *Libre By Nexus v. Buzzfeed, Inc.*, 311 F.Supp.3d 149, 155 (D.D.C. 2018) (internal quotation marks omitted).

**2. The "Gist" And "Sting" Of The HuffPost Article's Reference To Arpaio Are That He Was Convicted Of Criminal Contempt Of Court.**

In a case from Arpaio's home state, the Court of Appeals of Arizona held that a newspaper editorial accurately reported that a defamation plaintiff had been convicted of "fraudulent practices" but erroneously reported that he was "doing four-to-five years in prison." *Fendler v. Phoenix*

*Newspapers Inc.*, 636 P.2d 1257, 1259 (Ariz. Ct. App. 1981). The court affirmed a decision in favor of the newspaper defendants based on the substantial truth doctrine holding that, "for purposes of damage to reputation, which is the interest protected by an action for defamation, we believe the inaccuracy in the editorial was not significant." *Id.* at 1260-62. The opinion explained that *"**[d]amage to reputation flows not from being in a prison facility per se, but from the fact that the person has been adjudged guilty of a crime by a court of law***." *Id.* at 1262 (emphasis added). The "substantial 'sting,' is the same," the court held, "whether he had started his prison term or will never actually spend time in prison." *Id.*

A trial court in New York recently came to a similar conclusion. In *Pearlman v. NYP Holdings, Inc.*, Case No. 157546/14 (N.Y. Sup. Ct. May 11, 2015) (Dkt. No. 26), the plaintiff entered a guilty plea to money laundering, and was fined and sentenced to "a term of probation." *Id.* at 1.[11] A newspaper article later erroneously reported that the plaintiff "reside[s] in a federal prison" for money laundering. *Id.* at 2. The plaintiff sued for libel and defendant brought a motion to dismiss, which was granted in pertinent part on substantial truth grounds. *Id.* at 2-5. The court noted that, contrary to the mistaken newspaper report, plaintiff was "able to avoid incarceration," but nevertheless held that "the statement plaintiff engaged in criminal behavior by laundering money and was currently residing in federal prison was substantially true because she did plead guilty to a crime related to the laundering of money." *Id.* at 5. "The inaccurate assertion that she was imprisoned, as opposed to being on probation for her criminality," the court held, "could not have had a different or worse effect on the mind of a reasonable reader than the truth." *Id.* (citation omitted).

[11] A true and correct copy of this Order is attached as Exhibit C to the HuffPost Defendants' RJN.

This principle is not new. Over a century ago, a newspaper article reported that plaintiff Walter Skrocki said recently-assassinated President William McKinley "'ought to have been killed,'" and that Skrocki was thereafter "placed under arrest and held at the city jail" before being released. *Skrocki v. Stahl*, 110 P. 957, 958 (Cal. Ct. App. 1910). At the trial for libel against the newspaper, "it was not shown … that plaintiff himself was placed under arrest or held at the jail." *Id.* at 959. The California Court of Appeal held that "proof of the truth of the charge [was] a complete defense" to the libel claim. *Id.* The rule "manifestly based on right reason" is that "defendants were not required to justify every word of the defamatory matter" as it "was sufficient if the gist or sting of the libelous charge was justified, and immaterial variances and defects of proof upon minor matters are to be disregarded if the substance of the charge be justified." *Id.* The court ruled that the "failure to prove that plaintiff was arrested and detained in jail" was "without prejudice to any of his substantial rights" because the "sting of the charge here is that plaintiff said President McKinley 'ought to have been killed.'" *Id.* "In comparison with such a charge," the court asked "how insignificant is the accusation that he was arrested therefor and detained in jail," and answered that it was "comparatively trivial." *Id.* The court disagreed with plaintiff's contention that the allegedly false statement that he was arrested and imprisoned could support a defamation claim: "It would require certainly a good deal of temerity for any one to argue to a jury that, although defendants were justified in declaring in effect that plaintiff was an anarchist, he was damaged by the false publication in regard to his arrest." *Id.*

Forty years later, in *Wilson v. United Press Ass'ns*, 98 N.E.2d 391, 391-92 (Ill. Ct. App. 1951), a newspaper erroneously stated that the plaintiff was "now serving a 10-year sentence" when, in fact, he was free on bail pending an appeal and a new trial. The Illinois Appellate Court held that the "sole question presented is whether this circumstance can be made the basis of an

action for libel." *Id.* at 392. The court concluded that it could not as the article was "accurate reportage." *Id.* "It is evident," the court held that "the pertinent news angle … was the fact that plaintiff had been improperly convicted and had been granted a new trial. Whether or not he was serving his sentence or was free on bail was of secondary importance." *Id.* Citing *Skrocki,* the court stated that "plaintiff could not be injured by the erroneous statement that he was serving his ten-year sentence pending appeal of the case rather than the factual statement that he was out on bail pending appeal." *Id.* at 393. Therefore, the court held that the article at issue was "substantially true and accurate." *Id.* [12]

Consistent with the holdings in *Fendler, Pearlman, Skrocki* and *Wilson,* the gist and sting of the HuffPost Defendants' brief reference to Arpaio in an article about Kyrsten Sinema concerns Arpaio's conviction for criminal contempt of court. Compl., Dkt. 1-1; RJN, Exs. A-C. The harm to Arpaio's reputation is that he was convicted of a crime, not whether he was sent to "a prison facility per se," *Fendler,* 636 P.2d at 1262, or whether he was "able to avoid incarceration," *Pearlman,* Case No. 157546/14 (N.Y. Sup. Ct. May 11, 2015) (Dkt. No. 26), at 5. The erroneous statement that Arpaio "had been sent to prison" was "comparatively trivial," *Skrocki,* 110 P. at 959, and of "secondary importance" as compared to the "accurate reportage" of the "pertinent news angle" regarding Arpaio's conviction and Sinema's role in Arpaio's then-prospective pardon, *Wilson,* 98 N.E.2d at 392. Over a century of precedent nationwide supports the conclusion that the HuffPost Article was substantially true. Given Arpaio's flagrant, knowing and willful disobedience of Judge Snow's Injunction, his criminal conviction therefor and his acceptance of a pardon which is

[12] *Accord Hayward v. Watsonville Register-Pajaronian and Sun,* 265 Cal. App. 2d 255, 257-58, 261-62 (1968) (newspaper's erroneous statement that plaintiff "served a term in a Kansas prison" captured the "gist," "sting" and "substance" of an FBI investigation record under California's fair report statute, Civil Code § 47, even though plaintiff did not serve time in prison, but actually served only 11 days in a reformatory).

tantamount to a confession of guilt, "[i]t would," as the *Skrocki* court put it, "require certainly a good deal of temerity for" Arpaio to argue otherwise. 110 P. at 959.

**3. Arpaio's Defamation Claim Against The HuffPost Defendants Also Fails Under The Related Issue-Specific Libel-Proof Plaintiff Doctrine.**

A plaintiff is libel-proof "as a matter of law" when any damages he could recover for a defamatory statement would be non-existent or negligible due to the inability of that statement, within the context of the specific publication, to damage his reputation any further. *Logan v. District of Columbia*, 447 F.Supp. 1328, 1332 (D.D.C. 1978). This District Court has recognized that a "plaintiff may be deemed 'libel-proof' as a matter of law when his 'reputation is so diminished at the time of publication of the allegedly defamatory material that only nominal damages at most could be awarded," and also where "'true statements in a particular publication' have so badly damaged a plaintiff's reputation 'that minor false accusations within the same publication cannot result in further meaningful injury[.]'" *Carpenter v. King*, 792 F.Supp.2d 29, 34 n.2 (D.D.C. 2011) (citations omitted) (applying doctrine where it was "doubtful that a plaintiff's reputation could sustain any further harm from the alleged defamatory statements").[13]

[13] The decisions in *Logan* and *Carpenter* are consistent with other courts applying the libel-proof plaintiff doctrine. *See, e.g., Guccione v. Hustler Magazine, Inc.,* 800 F.2d 298, 303 (2d Cir. 1986) (cited in *Carpenter,* 792 F.Supp.2d at 34 n.2; "a plaintiff's reputation with respect to a specific subject may be so badly tarnished that he cannot be further injured by allegedly false statements on that subject"); *Cardillo v. Doubleday & Co.*, 518 F.2d 638 (2d Cir. 1975) (cited in *Logan*, 447 F.Supp. at 1332; a plaintiff might only be able to recover nominal damages for harm to reputation); *Lavergne v. Dateline NBC*, 597 Fed. Appx. 760, 762-63 (5th Cir. 2015) (affirming decision applying libel-proof plaintiff doctrine); *Lamb v. Rizzo*, 391 F.3d 1133, 1139 (10th Cir. 2004) (applying libel-proof plaintiff doctrine to allegedly defamatory articles); *Simmons Ford, Inc. v. Consumers Union of U.S., Inc.*, 516 F.Supp. 742, 750 n.34 (S.D.N.Y. 1981) (abrogated on other grounds) ("plaintiffs' reputational interest in avoiding further adverse comment . . . is minimal when compared with the First Amendment interests at stake"); *Wynberg v. Nat'l Enquirer, Inc.*, 564 F.Supp. 924, 928 (C.D.Cal. 1982) ("[W]hen an individual engages in conspicuously anti-social or even criminal behavior, which is widely reported to the public, his reputation diminishes proportionately . . . [and] there comes a time when the individual's

There can be no dispute that the brief reference to Arpaio in the HuffPost Article accurately stated he was convicted of criminal contempt of court. RJN Exs. A, B. Even if this Court concludes that the challenged portion of the HuffPost Article that was online for less than two days (stating in passing that Arpaio "was sent to prison") is not substantially true, the Court still can and should apply the issue-specific libel-proof plaintiff doctrine and dismiss the defamation claim because any damage associated with that short and fleeting reference within the HuffPost Article would be nominal at most, and could not support a libel claim.[14] If Arpaio cannot recover damages under the issue-specific libel-proof plaintiff doctrine, then his defamation claim fails for that additional reason.[15]

**B. Arpaio Did Not – And Cannot – Plausibly Allege That The HuffPost Defendants Acted With Actual Malice.**

**1. Arpaio Is Required To Plead And Prove Actual Malice.**

There is no question that Arpaio is a quintessential public figure subject to the actual malice standard. His past activities, offices held, media attention and future political ambitions all easily classify him as a public figure. Arpaio's Complaint touts his "distinguished 55-year law enforcement and political career," and his past and future political campaigns. Compl., ¶¶ 14-16, 32, 33. Even if he is not willing to concede the issue, the Court should have no trouble finding that

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reputation for specific conduct . . . is sufficiently low in the public's estimation that he can recover only nominal damages for subsequent defamatory statements"); *Cerasani v. Sony Corp.*, 991 F.Supp. 343, 354-355 (S.D.N.Y. 1998) (applying libel-proof plaintiff doctrine).

[14] Indeed, it is so nominal that Arpaio's defamation claim, which repeatedly complains about co-defendants' "convicted felon" label, Compl., ¶¶ 36, 41, does not mention harm specifically tied to the "sent to prison" statement.

[15] But even if Arpaio could recover only nominal damages then his case, which sounds in diversity, should be dismissed for lack of subject matter jurisdiction. 28 U.S.C. § 1332(a) (diversity jurisdiction requires an amount in controversy in excess of $75,000); *Allen v. Rehman*, 132 F. Supp. 2d 27, 29 (D.D.C. 2000) (dismissing complaint *sua sponte* where case did not meet the minimum jurisdictional requirement of $75,000).

Arpaio is a public figure. *Waldbaum v. Fairchild Publs, Inc.*, 627 F.2d 1287, 1293 n. 12 (D.C. Cir. 1980) ("[w]hether the plaintiff is a public figure is a question of law for the court to resolve").

"[L]aw enforcement officers, particularly those with supervisory authority" are considered public officials subject to the actual malice standard. *Thompson v. Armstrong*, 134 A.3d 305, 312 (D.C. 2016); *see also Beeton v. District of Columbia*, 779 A.2d 918, 920 (D.C. 2001) (holding that a correctional officer was a public official). Arpaio was repeatedly elected sheriff of Maricopa County, Arizona, a position he held for almost 25 years until the beginning of 2017. Compl., ¶ 14. He adopted the moniker "America's Toughest Sheriff," co-authored books about law enforcement, and was acknowledged by the Ninth Circuit Court of Appeals to be a public person. *Lacey*, 693 F.2d at 897, 917; *see also St. Amant v. Thompson*, 390 U.S. 727, 730 & n. 2 (1968) (holding that a *deputy* sheriff was a public official). Once a person becomes a public figure, they remain one regardless of the passage of time. *Dresbach v. Doubleday & Co., Inc.*, 518 F. Supp. 1285, 1290-91 (D.D.C. 1981) (finding continued public figure status even years after matters of public interest arose, and citing *Forsher v. Bugliosi*, 26 Cal. 3d 792, 811 (1980), for the rule that "once a man has become a public figure, or news, he remains a matter of legitimate recall to the public mind to the end of his days"). But Arpaio did not retire when he left the Sheriff's office. In 2018, he ran for the United States Senate, and he has announced his intention to run again. Compl., ¶¶ 15-16. In *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 271 (1971), the U.S. Supreme Court held that the actual malice standard applied to a candidate for the United States Senate. All of the foregoing, taken separately or together, make Arpaio a public figure.

Arpaio is also a public figure because he has placed himself in the midst of public controversies, particularly surrounding law enforcement and immigration issues, including the very issues that led to his conviction for criminal contempt of court. *See Doe No. 1 v. Burke*, 91 A.3d

1031, 1041 (D.C. 2014) (public figures are also "individuals who assume roles in the forefront of particular public controversies").[16] He has boasted that he had "support across the nation" for his controversial policies as sheriff, and he unabashedly admitted: "I want everyone to know what I do." *United States v. Arpaio*, 2017 WL 3268180 (D. Ariz. July 31, 2017), at *2. He was interviewed by the media many times in connection with the underlying facts that ultimately led to his conviction for criminal contempt of court. *See id.* at *2-*3 (listing media appearances with Fox News, Univision and PBS).[17]

Public figure plaintiffs like Arpaio must plead and prove that the defendant published allegedly defamatory material with "actual malice" – *i.e.*, "with 'knowledge that it was false or with reckless disregard of whether it was false or not.'" *Masson*, 501 U.S. at 510 (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279-80 (1964)). As the D.C. Circuit has made clear, "[t]he standard of actual malice is a daunting one," *McFarlane v. Esquire Magazine*, 74 F.3d 1296, 1308 (D.C. Cir. 1996), which imposes a "heavy burden" on public figure defamation plaintiffs, *Lohrenz v. Donnelly*, 350 F.2d 1272, 1283 (D.C. Cir. 2003). This high barrier to recovery by public figure and public official plaintiffs comes "against the background of a profound national

[16] Given his decades in public office and his prominence in public affairs, Arpaio is a general or all-purpose public figure. At a minimum, however, Arpaio easily qualifies as at least a limited purpose public figure on the controversies surrounding law enforcement, immigration and racial profiling – all of which were central to his conviction for contempt and the brief reference to Arpaio in the HuffPost Article. In *Waldbaum*, the D.C. Circuit "formulated a three-part test for identifying a limited-purpose public figure, requiring (1) that there have been a public controversy; (2) that the plaintiff have played a sufficiently central role in the controversy; and (3) that the alleged defamatory statement have been germane to the plaintiff's participation in the controversy." *Clyburn v. News World Commc'ns, Inc.*, 903 F.2d 29, 31 (D.C.Cir.1990) (citing *Waldbaum*, 627 F.2d at 1296–98). Each *Waldbaum* requirement is satisfied here.

[17] *See also Donahoe v. Arpaio*, 2011 WL 5119008 (D. Ariz. Oct. 28, 2011) (lawsuit with Arpaio at forefront regarding "widely reported controversies between members of the Maricopa County Sheriff's Office [including Arpaio] and County Attorneys' office") (emphasis added); *United States v. Arpaio*, 887 F.3d 979 (9th Cir. 2018) (opinion regarding Arpaio's criminal contempt conviction).

commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times,* 376 U.S. at 270. As the Supreme Court explained, "erroneous statement is inevitable in free debate and … it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive.'" *Id.* at 271-72. In particular, "[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of our system of government established by our Constitution." *Buckley v. Valeo,* 424 U.S. 1, 14 (1976); *see also Ocala Star-Banner Co. v. Damron,* 401 U.S. 295, 300-301 (1971) ("[p]ublic discussion about the qualifications of a candidate for elective office presents what is probably the strongest possible case for application of the *New York Times* [actual malice] rule").

Consistent with the national commitment to open debate on public issues and public officials (whether erstwhile, current or aspirational), the imposing actual malice standard focuses solely on the defendant's *actual* state of mind "at the time of publication." *Bose Corp. v. Consumer Union,* 466 U.S. 485, 512 (1984). "Mere negligence does not suffice." *Masson,* 501 U.S. at 510. Rather, the term "knowledge of falsity means simply that the defendant was *actually aware* that the contested publication was false." *Woods v. Evansville Press Co., Inc.,* 791 F.2d 480, 484 (7th Cir. 1986) (emphasis added). Similarly, to establish that the defendant published a statement with "reckless disregard" for the truth, the plaintiff must show "that the defendant actually had a '*high degree of awareness … of probable falsity*.'" *Harte-Hanks Commc'ns v. Connaughton,* 491 U.S. 657, 688 (1989) (emphasis added); *Kahl,* 856 F.3d at 118 (same). "Reckless disregard" is not measured "by what a reasonably prudent man would have published, or would have investigated before publishing." *St. Amant,* 390 U.S. at 731. Instead,

"[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication." *Id.* This standard "is subjective; the plaintiff must prove that the defendant actually entertained a serious doubt." *McFarlane*, 91 F.3d at 1508. The actual malice standard is not satisfied even by proof of "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Clyburn*, 903 F.2d at 33 (internal quotation marks omitted). As an additional safeguard, the First Amendment requires that the plaintiff prove actual malice by "clear and convincing" evidence. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255-57 (1986).

**2. Arpaio Failed To Adequately Allege Actual Malice Against The HuffPost Defendants.**

In keeping with the high threshold to demonstrate actual malice and the policies encouraging debate over matters of public concern, this District Court routinely dismisses cases where the plaintiff has not adequately pleaded actual malice. *See, e.g., Fairbanks*, 314 F.Supp.3d at 93 (finding that complaint did not state a defamation claim where it "do[es] not provide clear and convincing evidence of actual malice"); *Deripaska v. Associated Press*, 282 F. Supp. 3d 133, 140 (D.D.C. 2017) (rejecting argument that "alleging actual malice is unnecessary at this [pleading] stage" and dismissing complaint with prejudice based in part on plaintiff's failure to plead facts to show that defendant "acted with actual malice"); *Hourani v. Psybersolutions LLC*, 164 F. Supp. 3d 128, 144 (D.D.C. 2016) (dismissing complaint where "[t]he bald allegations of the Complaint are insufficient to allege malice"); *Parisi v. Sinclair*, 845 F. Supp. 2d 215, 218 (D.D.C. 2012) (dismissing claim where "plaintiffs merely allege in a conclusory fashion that the defamatory

statements were made and published by defendants with knowledge of their falsity or with reckless disregard for their truth").

These cases reinforce the rule that "threadbare recitals of the elements of a cause of action, supported by mere conclusory statements," and "formulaic recitation[s] of the elements" do not meet basic pleading requirements sufficient to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678. In *Fairbanks*, the plaintiff's complaint articulated four different bases for defendant's purported actual malice, including an alleged "fail[ure] to perform due diligence consistent with professional standards of journalism," but the Court concluded that the plaintiff's allegations did not "come[] close to satisfying the First Amendment's demanding standard for public figures bringing defamation actions," and dismissed the defamation claim. 314 F.Supp.3d at 92-93. In *Deripaska*, the plaintiff "failed to adequately allege actual malice" even though his complaint articulated specific "crucial background" information that was allegedly intentionally omitted from a publication, but even that, the Court ruled, did "not come close to plausibly alleging that the [defendant] acted with actual malice or reckless disregard for the facts when it published the article in question." 282 F.Supp.3d at 143-44. In *Parisi*, 845 F.Supp.2d at 218–19, this Court dismissed the complaint where it contained "no factual allegation, other than the plaintiffs' own assertions that the statements were false." Similarly, in *Hourani*, this Court quoted the plaintiff's conclusory allegations of actual malice and then held that the "Complaint does not allege any ***facts*** supporting the claim that [defendants] made statements knowing they were false or with reckless disregard to their truth." 164 F.Supp.3d at 144 (emphasis added) (dismissing complaint).

Without any facts to support an assertion of actual malice, Arpaio alleges that "Defendant Robillard falsely claimed and reckless disregard for the truth [*sic*] that Plaintiff Arpaio had been 'sent to prison for contempt of court,'" and that "Defendants acted with actual malice insofar as

they knew that the statements made against Plaintiff Arpaio were false and/or recklessly disregarded their falsity." Compl., ¶¶ 24, 40. That is the sum total of Arpaio's allegations about the HuffPost Defendants' purported state of mind at the time of publication.[18] That is plainly insufficient. *See Schatz v. Republican State Leadership Cmte.*, 669 F.3d 50, 56 (1st Cir. 2012) (complaint dismissed because plaintiff advanced "merely legal conclusions" with "buzzwords" of actual malice rather than "well-pled facts"); *Biro v. Conde Nast*, 807 F.3d 541, 544-46 (2d Cir. 2015) (affirming dismissal of defamation claim for failure to adequately allege actual malice). Arpaio's allegations are akin to the rejected conclusory assertions in *Parisi* and *Hourani* that merely recited the element of actual malice without any plausible supporting facts. Arpaio's Complaint falls short of the more specific – but flawed – allegations of actual malice in *Fairbanks* and *Deripaska* that still did not "come close" to a sufficient allegation to satisfy the *Iqbal*/*Twombly* standard. Arpaio failed to adequately plead actual malice, and his defamation claim should be dismissed for that additional reason.

**3. Arpaio Cannot Plausibly Allege That The HuffPost Defendants Acted With Actual Malice.**

Arpaio cannot, consistent with *Iqbal/Twombly* or Rule 11 of the Federal Rules of Civil Procedure, plausibly allege that the HuffPost Defendants acted with knowledge of falsity or reckless disregard for the truth. Arpaio alleges that "no efforts have been taken by Defendant HuffPo or Defendant Robillard to correct this false statement [about being 'sent to prison for

[18] Arpaio also makes the insufficiently conclusory allegation that "Defendants' statements are defamatory per se insofar as they falsely accuse and with reckless disregard [*sic*] Plaintiff Arpaio of having been convicted of a felony." Compl., ¶ 41. But the HuffPost Article does not accuse Arpaio of "having been convicted of a felony" so that allegation, even if it satisfied the *Iqbal/Twombly* standard – which it does not – does not apply to the HuffPost Defendants. Compl., Dkt. 1-1; RJN, Exs. A, B.

contempt of court']." Compl., ¶ 26. That allegation is manifestly false, and is disproven by Arpaio's own exhibits, which show that the HuffPost Defendants ***did*** promptly correct the HuffPost Article. *Compare* Compl., Dkt. 1-1 at 2 (with handwritten note reading "Initial Report") *with id.* at 3 (with handwritten note reading "Updated Report" and circling "***CORRECTION***" at the bottom of the corrected Article); *see also* RJN, Exs. A and B, showing original and corrected versions of the HuffPost Article. The Court should reject Arpaio's allegation in favor of the attachments to the Complaint and Request for Judicial Notice. *Owens v. BNP Paribas, S.A.*, 897 F.3d 266, 272-273 (D.C. Cir. 2018) (stating that the court need not "accept as true the complaint's factual allegations insofar as they contradict exhibits to the complaint or matters subject to judicial notice") (quoting *Kaempe v. Myers*, 367 F.3d 958, 963 (D.C. Cir. 2004)); *Rivera v. Rosenberg & Assocs., LLC*, 142 F.Supp.3d 149, 161 (D.D.C. 2015) ("[w]here, as here, the complaint's factual allegations are contradicted by exhibits incorporated by reference in the complaint and of which the Court may take judicial notice, the Court need no longer accept as true plaintiff's version of events"). Although actual malice is measured at the time of publication, numerous courts have held that a correction is evidence of a lack of actual malice. *See Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 605 (D.D.C. 1977) (stating that a correction "is significant and tends to negate any inference of actual malice")*; Logan v. District of Columbia*, 447 F. Supp. at 1332 ("the correction published the next day by [defendant]" tends to negate "any inference of actual malice," quoting *Hoffman*). Arpaio's failure to adequately allege actual malice is not surprising since there are no plausible facts – let alone the requisite clear and convincing evidence – that could support a finding of actual malice, and the one post-publication allegation from Arpaio is belied by his own evidence.

Arpaio's defamation claim should be dismissed with prejudice because the HuffPost Defendants' statement about Arpaio is substantially true, because he is libel-proof as to the

challenged statement and also because he does not – and cannot – articulate any specific facts to demonstrate that the HuffPost Defendants acted with actual malice.

## II. ARPAIO FAILS TO STATE A CLAIM FOR TORTIOUS INTERFERENCE WITH PROSPECTIVE BUSINESS RELATIONS OR FALSE LIGHT.

Arpaio's second claim for tortious interference with prospective business relations and his third claim for false light should also be dismissed for several independent reasons.

As a threshold matter, the tortious interference and false light claims do not apply to the HuffPost Defendants because the face of the Complaint (as well as judicially noticeable material) show that the HuffPost Defendants did not engage in the activity about which Arpaio is complaining. The tortious interference and false light claims are based on the "Defamatory Publications," which is defined in the Complaint to mean publications that refer to Arpaio as a "felon." Compl., ¶ 17 (defining "Defamatory Publications" to include publications that refer to Arpaio as a "felon"); *id.*, ¶¶ 47-48, 51-53 (basing the tortious interference and false light claims on the "Defamatory Publications," including *id.*, ¶ 53, which, bases the false light claim on the publications that allegedly "accuse Plaintiff Arpaio of having been convicted of a felony"). The HuffPost Article, however, does not refer to Arpaio as a "felon." Compl., Dkt. 1-1 (HuffPost Article and correction attached to Complaint, neither of which refer to Arpaio as a "felon"); RJN, Exs. A, B (same). Because the HuffPost Defendants did not call Arpaio a "felon," the tortious interference and false light claims do not apply to them. *See Lane*, 985 F.Supp.2d at 148 (false light claim only applies against defendant "who gives publicity to a matter concerning another"); *McNamara v. Picken*, 866 F.Supp.2d 10, 15 (D.D.C. 2012) (to establish a claim for tortious interference "a plaintiff must plead … *intentional* interference inducing or causing a breach or termination of the relationship or expectancy") (emphasis added).

But even if the tortious interference and false light claims were extended to the HuffPost Article, such claims are duplicative of the defamation claim and fail for the same reasons the defamation claim fails. *Compare* Compl., ¶¶ 35-43 (allegations in defamation claim) *with id.*, ¶¶ 44-56 (allegations in tortious interference and false light claims which are expressly based on the "Defamatory Publications," *id.*, ¶¶ 47-48, 51-53). Where a "defamation claim fails, so do … other tort claims based upon the same allegedly defamatory speech" because the "First Amendment considerations that apply to defamation … apply also to [plaintiffs'] counts for false light and tortious interference." *Farah v. Esquire Magazine,* 736 F.3d 528, 540 (D.C. Cir. 2013). This principle is based on the well-established rule that "a plaintiff may not use related causes of action to avoid the constitutional requisites of a defamation claim." *Moldea v. New York Times Co.*, 22 F.3d 310, 319-20 (D.C. Cir. 1994) (*Moldea II*) (rejecting duplicative false light claim); *Moldea v. New York Times Co.*, 15 F.3d 1137, 1151 (D.C. Cir. 1994) (*Moldea I*) ("a plaintiff may not avoid the strictures of the burdens of proof associated with defamation by resorting to a claim of false light"); *Farah v. Esquire Magazine*, 863 F.Supp.2d 29, 39 (D.D.C. 2012) ("Plaintiffs' claim for tortious interference fails because it is grounded in the same nonactionable claim for defamation"), *aff'd*, 736 F.3d 528, 540 (D.C. Cir. 2013).[19]

**A. The Tortious Interference Claim Fails For Additional Reasons.**

First, Arpaio's tortious interference claim also fails because he does not allege the existence of a "valid business relationship or expectancy," which is one of the elements of the claim. *Xereas*

[19] Likewise, where an ancillary tort claim is based on an alleged defamation that fails the *Twombly/Iqbal* standard, it should be dismissed for that reason as well. *Zelaya v. UNICCO Svc. Co.*, 587 F.Supp.2d 277, 287 (D.D.C. 2008) ("[t]he intentional interference required for the plaintiff's claim is premised entirely on a defamation allegation that is fatally deficient under the *Twombly* pleading standard").

*v. Heiss*, 933 F.Supp.2d 1, 11 (D.D.C. 2013).[20] Such relationships must be "commercially reasonable to anticipate." *Carr v. Brown*, 395 A.2d 79, 84 (D.C. 1978) (affirming grant of motion to dismiss). Arpaio alleges unspecified harm to his ability to obtain "funding for [his] 2020 political campaign." Compl., ¶ 48; *see also id.*, ¶¶ 45-47. But campaign contributions are not "business relationships." *See Son v. Kim*, No. 05-2318, 2007 WL 950085, at *2 (D.D.C. Mar. 28, 2007) (ruling in a jurisdictional context that "politics is not business," and having political support does not "show that defendant derives substantial revenue from goods used or consumed, or services rendered").[21] Just as this Court in *Son* found that political support does not equal revenue from goods or services, Arpaio cannot show that the *possibility* of future political donations amounts to a "valid business relationship or expectancy."[22]

Second, even if aspirational campaign contributions could be considered valid business relationships or expectancies, Arpaio failed to articulate the necessary element of the present and plausible "existence" of such relationships or expectancies. *Economic Research Svcs., Inc. v. Resolution Economics, LLC*, 208 F.Supp.3d 219, 229 (D.D.C. 2016) (granting motion to dismiss in

[20] The elements of tortious interference are: "(1) the existence of a valid business relationship or expectancy between plaintiff and [a third party]; (2) knowledge of the relationship or expectancy between plaintiff and [a third party]; (3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage." *Zelaya*, 587 F.Supp.2d at 286.

[21] Arpaio does not directly allege interference with his prospect of winning a future seat in the United States Senate – or any other office – but the hope of winning an election also cannot support a tortious interference claim. *Marin v. McClincy*, 15 F.Supp.3d 602, 616 (W.D. Pa. 2014) (rejecting intentional interference with business relations claim based on future political career, holding, "Plaintiff's claim for interference with his future career in politics falls short … He cannot establish more than a mere expectancy or hope that he would have achieved elected office").

[22] To the extent Arpaio's position is that he would perform acts as an elected official in exchange for money received, that would be bribery, which is clearly not a "valid business relationship." 18 U.S.C. § 201.

part because plaintiff "fail[ed] to plead the existence of valid business relationships with the requisite specificity"). Arpaio names only two specific parties with whom he supposedly lost relationships: the "Republican National Committee ('RNC'), and its National Republican Senate Campaign Committee ('NRSC')." Compl., ¶ 45.[23] Nowhere, however, does Arpaio allege that he has *existing* relationships with the RNC or NRSC whereby he could reasonably expect they would contribute money to a future political campaign. *Twombly*, 550 U.S. at 555 (plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level," and mere "formulaic recitation of the elements of a cause of action will not do").

Setting aside that Arpaio has been convicted of a crime and could not win in his State's primary even before the HuffPost Article was published, the existence of Arpaio's purported relationships with the RNC and NRSC are particularly implausible under *Twombly/Iqbal* because, according to judicially noticeable records from the Federal Election Commission ("FEC"), Arpaio did not receive contributions from the RNC or NRSC in his 2018 run for United States Senate. RJN, Exs. D, E. And, although Arpaio contends the RNC and NRSC would be a conduit for money from other committees, he received a total of only $5,000 from just one committee (Conservative America Now PAC) in the 2017-2018 cycle. *Id.* Furthermore, Arpaio's claim is implausible because political donors can decide to contribute to a candidate's campaign – or not – at their discretion, and candidates are therefore akin to at-will employees who do not have a sufficiently fixed or assured relationship with which to interfere. *Zelaya*, 587 F.Supp.2d at 287 ("District of

[23] Beyond the RNC and NRSC, Arpaio only vaguely alleges that he lost relationships with unspecified "affiliated political action committees and entities and persons, including donors." Compl., ¶ 45; *see also id.*, ¶ 47. Such generalized allegations are insufficient. *Xereas*, 933 F.Supp.2d at 11 ("a claim of tortious interference with prospective business relations cannot survive where the plaintiff does not allege any specific future business relations and only provides general references to specific opportunities").

Columbia law … and elsewhere, has consistently failed to recognize a cause of action for intentional interference with prospective contractual relations where the expectancy is based on at-will employment"); *Economic Research Svcs.*, 208 F.Supp.3d at 229 ("if there is no fixed or assured employment there is nothing tangible with which to interfere") (internal quotation marks omitted).

Third, Arpaio's tortious interference claim should also be dismissed because he does not plausibly allege that the HuffPost Defendants knew he would run for office again in 2020 let alone that he had relationships with the RNC, NRSC or affiliated entities. Compl., ¶ 45. *Zelaya*, 587 F.Supp.2d at 286 ("knowledge of the relationship or expectancy on the part of the defendant" is an element of claim). Arpaio merely alleges that "Defendants are aware of these prospective business relationships." Compl., ¶ 47. That type of conclusory allegation is not sufficient. In *Elemary v. Philip Holzmann A.G.*, 533 F.Supp.2d 116, 132-33 (D.D.C. 2008), this Court held that a plaintiff alleging tortious interference must "plead *some* facts from which the court may reasonably infer knowledge" of a relationship, and granted a motion to dismiss an interference claim where the plaintiff alleged only "conclusory assertion and unreasonable inferences." (Emphasis in original.) Arpaio's contention is even more implausible because, according to FEC records, he received no contributions from the RNC or NRSC. RJN, Exs. D, E.

Fourth, a plaintiff alleging tortious interference must make a "strong showing of intent" to interfere, and "a general intent to interfere or knowledge that conduct will injure the plaintiff's business dealings is insufficient to impose liability." *Bennett Enterprises, Inc. v. Domino's Pizza, Inc.*, 45 F.3d 493, 499 (D.C. Cir. 1999) (internal quotation marks omitted). Here, Arpaio generally alleges that all of the Defendants have "leftist enmity of Arpaio," and purportedly sought to "influence" political action committees and others not to give campaign money to Arpaio. Compl., ¶¶ 47, 48. Such allegations are not sufficient under *Twombly/Iqbal* to support Arpaio's claim that

the HuffPost Defendants, with their fleeting statement and almost immediate correction, intended to interfere with Arpaio's as-yet unformed, unannounced and unspecified "2020 political campaign." *Id.*, ¶ 48.

**B. The False Light Claim Also Fails Because The HuffPost Article Was Not "Highly Offensive."**

As discussed above, Arpaio's false light claim is subject to the same constitutional limitations as his defamation claim under the doctrines of substantial truth, libel-proof plaintiff and actual malice, and can be disposed of on any of those bases. *Farah,* 736 F.3d at 540; *Moldea I,* 15 F.3d at 1151; *Moldea II,* 22 F.3d at 319-20; *Lane,* 985 F.Supp. at 148. Arpaio's false light claim also fails as a matter of law for yet another reason.

A false light plaintiff must show that he or she was portrayed in a manner that would be "highly offensive to a reasonable person." *Lane*, 985 F.Supp. at 148.[24] Courts can determine offensiveness as a matter of law. *Id.* at 148-49 (dismissing false light claim both because it did "not objectively cross the 'highly offensive' threshold" and because it overlapped with defenses raised in response to a concurrently-pled defamation claim). The HuffPost Article correctly stated that Arpaio was convicted of criminal contempt, referenced President Trump's pardon and quickly corrected the erroneous statement that Arpaio "had been sent to prison." Compl., Ex. 1-1; RJN, Exs. A, B. Under the circumstances, a reasonable fact-finder would not find the original HuffPost Article "highly offensive."

[24] The elements of false light invasion of privacy are: *"*One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if (a) the false light in which the other was placed would be highly offensive to a reasonable person; and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed." *Id.*

## CONCLUSION

The HuffPost Defendants respectfully request that the Court grant their Motion to Dismiss in its entirety and dismiss each of the claims against them with prejudice.

Dated: March 15, 2019

Respectfully submitted,

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**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLUMBIA**

| | | |
|---|---|---|
| JOSEPH MICHAEL ARPAIO, | * | |
| Plaintiff, | * | |
| v. | * | Civil Action No. 1:18-cv-002894-RCL |
| JEFF ZUCKER, CHRIS CUOMO, CABLE NEWS NETWORK, INC., KEVIN ROBILLARD, HUFFINGTON POST, TESSA STUART and ROLLING STONE, | * | |
| Defendants. | * | |
| | * | |

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**PROPOSED ORDER**

Upon consideration of the Motion to Dismiss Pursuant to Federal Rule of Civil Procedure brought by Defendants TheHuffingtonPost.com, Inc. and Kevin Robillard, it is hereby ORDERED that the motion is GRANTED. Plaintiff Joseph Michael Arpaio's Complaint against Defendants TheHuffingtonPost.com, Inc. and Kevin Robillard is dismissed with prejudice and without leave to amend.

Dated this _____ day of _____ 2019.

_____

ROYCE C. LAMBERTH
UNITED STATES DISTRICT COURT JUDGE

**CERTIFICATE OF SERVICE**

I hereby certify that on March 15, 2019, copies of the foregoing Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6) and Proposed Order were electronically filed through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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